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AUGUST B. LANDIS

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 10-33637 DM 11
)	
BRUGNARA PROPERTIES VI,)	Chapter 11
)	
Debtor-in-Possession.)	Date: June 3, 2011
)	Time: 10:00 a.m.
)	Ctrm: Hon. Dennis Montali
)	235 Pine Street, Courtroom 22
)	San Francisco, CA

**REPLY TO DEBTOR'S OPPOSITION TO U.S. TRUSTEE'S MOTION
TO CONVERT CASE TO CHAPTER 7 UNDER 11 U.S.C. § 1112**

August B. Landis, Acting United States Trustee for Region 17, ("U.S. Trustee") hereby replies to the Debtor's Opposition to U.S. Trustee's Motion to Convert Case to Chapter 7 under 11 U.S.C. § 1112(b) ("Debtor's Opposition").

Despite having been in chapter 11 for almost eighteen months – nine months in the current case and another nine months in its previous chapter 11 case – the Debtor has not shown that this is or ever has been a legitimate reorganization. The Debtor has casually treated fiduciary requirements as merely "technical" matters, has only complied with requirements when prodded to do so, and has yet to fully disclose its true financial situation. The U.S. Trustee asserts that the inexcusable delay, without accountability or transparency, should not be tolerated by the court.

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REPLY TO DEBTOR'S OPPOSITION TO UST'S MOTION TO CONVERT CASE TO CHAPTER 7
UNDER 11 U.S.C. § 1112: 10-33637 DM

- 1 -

1 The following facts may be gleaned from the record:

- 2 • Debtor would not have filed monthly reports of operations without U.S. Trustee
3 enforcement action.
- 4 • Debtor would not have paid quarterly fees without U.S. Trustee enforcement action.
- 5 • Debtor would not have furnished evidence of a debtor in possession account without U.S.
6 Trustee enforcement action.
- 7 • Despite a request from the U.S. Trustee, the Debtor has yet to provide evidence of
8 insurance for the sole asset of the estate.
- 9 • Debtor's monthly operating reports, by failing to list post-petition liability, do not appear
10 to be accurate.
- 11 • Debtor has not made any payments to Wells Fargo/Wachovia since September 2008. At
12 the time of filing of this case, Debtor's obligation to Wells Fargo/Wachovia was
13 \$7,254,033.19, consisting of arrearage and other charges in the amount of \$875,416.82
14 for payments missed, late charges, fees and interest, for the period September 1, 2008,
15 through September 1, 2010. (See Proof of Claim 1-1 filed on November 22, 2010.)
- 16 • At the foregoing rate, Debtor has likely accrued post-petition obligations to Wells
17 Fargo/Wachovia in the amount of about \$400,000, a significant amount which has been
18 completely omitted from Debtor's monthly reports of operations. Since a critical part of
19 the Debtor's plan is a purported loan modification with Wells Fargo/Wachovia, ignorance
20 about the status of the Wells Fargo/Wachovia debt is inexcusable.
- 21 • Debtor has not made any real estate tax payments since 2008. The Debtor currently owes
22 the City and County of San Francisco Tax Collector \$337,964.63 for real estate taxes for
23 fiscal years 2008-2009, 2009-2010, 2010-2011. (See Proof of Claim 3-1 filed on March
24 7, 2011.) This debt appears to be accruing at the rate of about \$100,000 per year.
- 25 • Debtor has not filed tax returns for the State of California since 2008. (See Proof of
26 Claim 2-1 filed on December 1, 2010.)
- 27 • Debtor's plan proposals completely overlooked tax obligations until the U.S. Trustee
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1 brought this shortcoming to the Debtor's attention.

- 2 • While the Debtor has now recognized in its Second Amended Plan that it has failed to
3 filed tax returns, the Debtor has still not fully disclosed which returns have not yet been
4 filed, the status of tax return preparation, and projected date for becoming current on its
5 responsibility to be current tax obligations.
- 6 • Debtor would not have addressed its failure to file tax returns or tax deficiencies if the
7 U.S. Trustee had not intervened.
- 8 • Debtor's current plan lacks any definition regarding timing or action and lacks
9 enforceable consequences.
- 10 • Debtor's exit strategy (funding for the plan) has continuously changed throughout the
11 case.

12 Furthermore, the U.S. Trustee has continuing concerns about the following:

13 Plan viability. The proposed plan is not a consensual plan. Debtor's counsel has admitted that
14 there has not in fact been contact with the secured creditors about the plan. Thus, creditors are not
15 necessarily supportive of the current provisions.

16 Tax obligations. The U.S. Trustee is informed and believes that the Debtor is delinquent in filing
17 both state and federal tax returns. Debtor has remained silent about specifics. The lack of candor about
18 this obligation by the Debtor is of concern.

19 Books and records. The Debtor, through its responsible individual admitted at the early stages
20 of the case the absence of books and records. There appears to be little effort by the responsible
21 individual to obtain control over this Debtor's financial situation.

22 Communication with Luke Brugnara. With the purportedly newly discovered information about
23 community assets available to Kay Brugnara, Debtor appears to be placing reliance on yet another reason
24 for delay. According to the Debtor's Opposition, the ability to exit chapter 11 now turns upon Mrs.
25 Brugnara's "access" to community property assets, purportedly worth \$20,000,000. Instead of simply
26 getting Mr. Luke Brugnara to provide the whereabouts of the \$20,000,000, Mrs. Brugnara is instead
27 looking to the United States Government. If the Debtor is to be believed, communications difficulty
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1 with Luke Brugnara, who holds the key to \$20,000,000, is the primary obstacle to the preferred solution
2 to this case. See Debtor's Second Amended Disclosure Statement, p. 8.

3 The Debtor's suggestion of communication difficulties with Luke Brugnara is belied by Mrs.
4 Brugnara's recent active participation in litigation to assist her husband. In a recent filing by Luke
5 Brugnara opposing a motion filed by Eric Nyberg to withdraw as counsel for Luke Brugnara, Kay
6 Brugnara served the pleading on Mr. Nyberg. See Exhibit 1, "Opposition to Motion for Order to Allow
7 Kornfield, Nyberg, Bendes And Kuhner, P.C. to Withdraw As Attorney of Record for Plaintiff and
8 Cross-Defendant Luke Brugnara," filed in Adv. Pro. 09-3219, Luke Brugnara v. E. Lynn Schoenmann
9 in Case No. 09-30041, In re Brugnara Corporation.

10 Since Mr. Nyberg's motion was filed on April 21, 2011, and Mr. Brugnara's opposition was filed
11 fourteen days later on May 5, 2011, through Kay Brugnara, it would appear that communication between
12 Luke Brugnara and Kay Brugnara works well.

13 The U.S. Trustee asserts that the Debtor has had more than enough time to ascertain its true
14 financial situation, to come to terms with creditors, and to propose a viable plan.

15 Thus, the court may find "cause" to convert the above-captioned case, based upon any of the
16 following independent bases:

- 17 • The estate has experienced continuing loss in connection with the nonpayment of
18 recurring obligations, including to Wells Fargo/Wachovia, the City and County of San
19 Francisco, and there is no reasonable likelihood of rehabilitation, within the meaning of
20 11 U.S.C. § 1112(b)(4)(A);
- 21 • The Debtor has failed to maintain adequate insurance, within the meaning of 11 U.S.C. §
22 1112(b)(4)(C);
- 23 • The Debtor's failure to comply with reporting requirement has been inexcusable, within
24 the meaning of 11 U.S.C. § 1112(b)(4)(F);
- 25 • The Debtor has failed to timely provide information requested by the United States
26 Trustee, within the meaning of 11 U.S.C. § 1112(b)(4)(H);
- 27 • The Debtor has failed to timely pay taxes owed after the date of the order for relief and
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1 has failed to file tax returns due after the date of the order for relief, within the meaning
2 of 11 U.S.C. § 1112(b)(4)(I).

3 There is ample cause to convert this case to a case under chapter 7, and conversion is in the
4 interests of the estate and creditors. The United States Trustee respectfully moves the Court for an
5 order converting this case to chapter 7 and such other and further relief as is just.

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7 Dated: May 26, 2011

Respectfully submitted,

August B. Landis, Acting U.S. Trustee

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10 By: /s/ Donna S. Tamanaha
 Assistant U.S. Trustee